Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

BRAD HAYWOOD SIMS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

APPENDIX TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

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APPENDIX A

[RELEASED: JUNE 14, 1991]

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1990-91

CR-89-342

Brad Haywood Sims

v.

State

Appeal from Montgomery Circuit Court
(CC-89-2098-PH)

TAYLOR, JUDGE

The appellant, Brad Haywood Sims, was convicted of distributing a controlled substance, cocaine, in violation of 13A-12-211, Code of Alabama 1975. He was sentenced to 10 years in prison. The sentence was split, with three years to be served in prison and the remainder on probation. The instant appeal is the result of the appellant's second trial. The appellant's first trial ended in a mistrial with the jury unable to reach a verdict.

The evidence tended to show that as a result of a search warrant executed on the appellant's house, $360.00 in marked bills was discovered. These bills had been given to a confidential informant so that he could purchase cocaine. A total of $932.00 was recovered from the appellant's home. The appellant raises eight issues on appeal. However, since this case must be reversed, we address those issues which merit a reversal.

I

The appellant initially contends that the trial court erred in not suppressing the evidence recovered in his home since his home was searched as a result of a warrant, which, he argues, contained false statements in the affidavit supporting the warrant. The affidavit accompanying the warrant reads as follows:

> "That a confidential and reliable informant, hereinafter referred to as 'A' observed a quantity of an off-white rocky substance which appeared to 'A' to be 'crack' cocaine being stored

in the residence located at 3437 Perry Street, Montgomery. Alabama. within the last seventy-two (72) hours.

"Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.

"Further probable cause being that 'A' has given the affiant information in the past which has been proven true through investigative means.

"Further probable cause being that 'A' has assisted the Narcotics & Intelligence Bureau in numerous investigations which have resulted in numerous arrests.

"Further probable cause being that the power for the residence at 3437 Perry Street is in the name of Brad Sims.

"Further probable cause being that intelligence information obtained by Narcotics & Intelligence Bureau personnel indicates that Brad Sims is involved in illegal narcotics activity.

"As Brad Sims is a member of the Montgomery Police Department and is therefore most likely armed with at

> least a Police Department issue 9mm automatic pistol, a no-knock clause is being requested in this warrant for officer safety.
>
> "The foregoing is based on personal knowledge of the affiant and on facts obtained by the Narcotics and Intelligence Bureau, Administrative Division, "Montgomery Police Department....

The appellant maintains that Officer Lay, who executed the affidavit in support of the warrant, made several misrepresentations to the magistrate in order to obtain the warrant. The appellant contends that the sections of the affidavit underlined above were false. Specifically, he cites Lay's testimony at the suppression hearing in which Lay stated that the confidential informant, Julius Moore, stayed in the car and never went into the Sims residence. Lay further stated at the suppression hearing that the informant did not witness any drug transaction because he remained in the car. The appellant contends that the informant did not have any

personal knowledge of the facts testified to in the affidavit and that the informant was relying on information supplied to him by another individual, Eric Johnson, who the appellant identifies as a known drug dealer. This fact was not stated in the affidavit or told to the magistrate.

The following occurred during the cross-examination of Officer Lay:

> "Q [Defense Counsel] - Now, isn't it true that Julius Moore stayed out in the car and never went into the home of Brad Sims during the time of this so-called transaction between Eric Johnson and Brad Sims?
>
> "A - Yes, sir.
>
> "....
>
> "Q - Isn't it true, sir, that Julius Moore told you that he stayed out in the car during the time that Eric Johnson went in to see Brad Sims about drugs?
>
> "A - Yes, sir.
>
> "Q - Were you also within the area at the time the red Saab driven by Julius Moore was waiting outside?

"A - No, sir.

....

"Q - He didn't see any drugs either at the house or outside the house -- Let me rephrase it. Isn't it true Julius Moore, whom you have identified as A, never observed any drugs, crack or any substance, being stored in the residence at 3437 Perry Street?

"A - No, sir. He did not go in the residence. "....

"Q - Isn't it true, sir, that Julius Moore never personally saw Eric Johnson hand any money to Brad Sims?

"A - Yes, sir...."

The United States Supreme Court, in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), recognized the importance of the veracity of the statements made in the affidavit to support a search warrant. "The Achilles' heel of any warrant is the presence of porobable cause for the same; and this, in turn, can be resolved only by resort to the supporting affidavit...." E. Mascolo, Impeaching the Credibility of Affidavits for Search

Warrants: Piercing the Presumption of Validity. 44 Conn. Bar. J. 9 (1970). "The veracity of the assertions supporting probable cause is integral to the criminal justice system." United States v. Cortina. 630 F.2d 1207, 1213 (7th Cir. 1980). The warrant clause itself takes the affiant's good faith as its premise. See Cortina. 630 F.2d at 1213.

The United States Supreme Court, in Franks, stated that an individual could challenge the truthfulness of the material in-ths affidavit. See also Richardson v. State, 376 So.2d 205 (Ala. App.), aff'd, 376 So.2d 228 (Ala. 1978). Relying on the Fourth and Fourteenth Amendments, the Supreme Court stated:

> "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires

> that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

Franks, 438 U.S. at 155-56; See also Moore v. State, 570 So.2d 788 (Ala. Cr. App. 1990); Villemez v. State. 555 So.2d 342 (Ala. Cr. App. 1989); Gray v. State, 507 So.2d 1026 (Ala. Cr. App. 1987).

The Supreme Court went further in Franks to say:

> "'[W]hen the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a truthful showing' (emphasis in [Halsey]). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from

> informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true."

Franks, 438 U.S. at 164-65, quoting United States v. Halsey. 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966).

Initially, we must determine whether the statements made in the affidavit were made either intentionally or with reckless disregard for the truth. "We know what intentional lies are, but the meaning of 'reckless disregard for the truth' is not self-evident...." United States v. Williams, 737 F.2d 594, 602 (7th Cir. 1984), cert. denied, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). An affiant acts with "reckless disregard for the truth where he, "in fact entertained serious doubts as to the truth of his" allegations.' ... Reckless disregard for the truth may also be proved inferentially 'from

circumstances evincing "obvious reasons to doubt the veracity" of the allegations.'" United States v. A Residence Located at 218 Third Street. 805 F.2d 256, 258 (7th Cir. 1986). "Because states of mind must be proved circumstantially, a fact finder may infer reckless disregard from circumstances evincing' obvious reasons to doubt the veracity' of the allegations." Williams. 737 F.2d at 602.

When an appellate court reviews a ruling by a lower court on a question concerning whether an individual made a statement with reckless disregard for the truth "'[a]ppellate judges must exercise independent judgment and determine whether the record establishes [reckless disregard for the truth] with convincing clarity.'" A Residence Located at 218 Third Street. 805 F.2d at 259, quoting Bose Corp. v. Consumers Union of United States. Inc., 466 U.S. 485, 514, 104 S.Ct. 1949, 1967, 80 L.Ed.2d 502 (1984). It is clear after a review of the

hearing that the complained-of statements were made with at least a reckless disregard for the truth. The informant, upon whom Lay based his information, did not enter the home of the appellant and did not witness a drug transaction. Another individual, identified as Eric Johnson, was said to have entered the residence and to have made the buy at the residence. However, none of this information is stated in the affidavit and it was not told to the magistrate. Indeed there is no information as to the veracity of Eric Johnson. "Unlike an officer in the field, a magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable." United States v. Kirk, 781 F.2d 1498, 1505 (11th Cir. 1986). The misrepresentations made by Officer Lay resulted in his committing two offenses: "[o]ne against the constitutional guarantee against

unreasonable searches, and a second against the judicial system." Cortina, 630 F.2d at 1213.

The underlined portions must be deleted from the affidavit. We must then determine whether probable cause still exists. Moore, supra; Villemez, supra. (For a thorough discussion of the case law on misstatements made in an affidavit supporting a warrant, see 24 A.L.R.4th 1266; W.LaFave, 2 Search and Seizure 4.4(c) (2d ed. 1987). In this case, after we delete the misrepresented portions from the affidavit, no probable cause exists. Probable cause deals with probabilities. "They are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Illinois v. Gates, 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The probable cause test "requires 'a practical, commonsense decision whether, given all the circumstances set

forth in the affidavit,' Id. 462 U.S. at 238, 103 S.Ct. at 2332, there is probable cause to believe the suspect committed an offense." United States v. Colklev 899 F.2d 297, 301-02 (4th Cir. 1990).

Thus all the evidence discovered as a result of the search of the appellant's house was due to be suppressed.

II

The appellant next contends that he was deprived of his right to equal protection under the law due to the prosecution's discriminatory exercise of peremptory challenges.

The record shows that 16 members of the 48-member venire were black and that of the state's 18 strikes, 14 were used to strike black veniremembers. The appellant, relying on Batson v. Kentuckv, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), objected to the prosecution's use of peremptory challenges, claiming that they were discriminatory in nature. The trial court

then required the state to explain its use of peremptory strikes. We have previously concluded that where a trial court has made no express finding that a prima facie case of discrimination has been established but nonetheless requires a prosecutor to explain its peremptory challenges, this court will consider such a finding to be implied and will proceed directly to evaluate the prosecution's explanations. Williams v. State. 548 So.2d 501 (Ala. Cr. App. 1988); Currin v. State. 535 So.2d 221 (Ala. Cr. App.), cert. denied, 535 So.2d 225 (Ala. 1988). See also United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987).

When explaining the basis for its peremptory strikes of blacks, the prosecution must offer a clear, specific, and legitimately race-neutral reason for each strike. Batson, supra, at 97; Ex parte Branch, 526 So.2d 609, 623 (Ala. 1987). In the instant case, several of the veniremembers who were struck had previous misdemeanor convictions and two others stated

that they had received "unjust traffic tickets." We consider these strikes to have been nondiscriminatory. See Jackson v. State, 549 So.2d 616 (Ala. Cr. App. 1989) (several prior convictions of juror is a valid race-neutral reason); Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd, 548 So.2d 605 (Ala. 1989) (dissatisfaction with police is a valid race-neutral reason). The reasons offered by the prosecutor for her remaining strikes present serious doubts to this court as to their validity. Those strikes are as follows:

> "Juror number 81, [J.M] lived on Early Street where the police had answered a call, and this particular neighborhood has been identified as a high crime area, in particular, drugs.
>
> "Juror number 25, [H.W.]. Our information there - and I personally observed [H.W.] in court chewing gum, not only during individual voir dire, but during the general voir dire. She was extremely soft-spoken, and it was extremely difficult for me to hear. She was very hesitant in her responses to the question, in particular to the question I asked about what she had heard and what was her opinion about any prior

> proceedings. My opinion was that she did not want to discuss that, and perhaps, had further knowledge she did not divulge.
>
> "Juror number 19, Ms. [R.B.]. [R.B's] attitude appeared to be extremely sad. I was concerned about her desire to be of service in this court. She had a very depressed look about her face. Further, Officer Jones identified her home area of Riviera Road as being that of a high crime area, in particular, drugs.
>
> "Juror number 75, Ms. [C.]. Ms. [C.] indicated she -- or did not indicate that she heard anything about this case. She came to court, and the best judgment I could make Your Honor, she sat towards the middle rear. She had glasses on. They appeared to be darkly tinted. I could not tell if it was for [medical] reasons or if it was because she had worn sunglasses in the courtroom. Because of the numerous exhibits and documents, blow-ups, and other things, I could not take a chance on whether or not she had a vision problem, or contrary to most people, wore sunglasses indoors.

The trial court accepted these reasons as valid. In viewing the prosecutor's actions as a whole, we consider that these challenges of black veniremembers were not based on sound

race-neutral grounds. This court may "reverse a trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination only if that determination is clearly erroneous." Parker v. State, 568 So.2d 335, 338 (Ala. Cr. App.1990).

Several of the reasons that the prosecutor gave for striking prospecutive jurors were that they lived in high crime areas. See above for reasons given for striking jurors numbers 81 and 19. (We note that one white juror who served on the jury was from a neighborhood with a higher crime rate than the average neighborhood in Montgomery.) We do not believe that this reason alone is a sufficient race-neutral reason.

> "'.. [T]he bare fact that [the venireperson] lived in a high crime area does not warrant the assumption that [that person] would be less interested in law enforcement or would be intimidated by appellant.' Williams, 548 So.2d at 506. ('A few simple questions addressed to this venireperson on voir dire would have cleared

up any doubt concerning the matter, but they were not asked.')"

Warner v. State, [Ms. 3 Div. 945, February 23, 1990]___So.2d___,___(Ala. Cr. App. 1990).

The prosecutor further stated that the reason she struck juror number 75 is that she wore darkly tinted glasses and that she did not know whether she needed the glasses for medical reasons. Here again, the prosecutor could have dispelled her doubts by asking further questions on voir dire. "'"A prosecutor's failure to engage black prospective jurors 'in more than desultory voir dire, or indeed to ask them any questions at all,' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." People v. Turner, 42 Cal. 3d 711, 726 P.2d 102, 111, 230 Cal. Rptr. 656 (1986).'"

Parker, 568 So.2d at 337, quoting Ave#Y Y# State. 545 So.2d 123, 127 (Ala. Cr. App. 1988).

Additionally, we reject the propriety of the prosecutor's striking of juror number 25. The prosecutor stated that this juror was struck because she was chewing gum and was very soft-spoken. We realize that the demeanor of a juror may be a sufficiently race-neutral reason in some instances, although it presents great difficulty to the reviewing authorities. Avery 545 So.2d at 127.

The record also contains testimony at the Batson hearing from several local attorneys. These attorneys had participated in trials prosecuted by the same assistant district attorney as the one in the present case. All of the attorney-witnesses testified that in each instance, the prosecutor had excluded approximately 80% of the black veniremembers. See Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd on other grounds, 548 So.2d 606 (Ala. 1989); Williams, supra; Warner, supra. We cite Judge Bowen, in Warner, stating:

> "In considering this issue, we have taken note of the fact that the State in this case does not write on a clean slate. A number of cases prosecuted in Montgomery County have been reversed because of a Batson violation. Powell v. State, 548 So.2d. 590 (Ala. Cr. App. 1988), affirmed on other grounds, 548 So.2d 606 (Ala. 1989); Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988); Ackers v. State, 548 So.2d 459 (Ala. Cr. App. 1g87). This consideration is a relevant factor in our review. United States v. Hughes, 864 F.2d 78, 80 (8th Cir. 1988). In view of this fact and the fact that the chief deputy district attorney testified that she 'highly expected' that she would have to justify her peremptory challenges against blacks with racially neutral reasons, we are somewhat puzzled by some of the very weak justifications given by the State."Warne,___ So.2d at____. The same prosecutor involved in the present case, was also involved in Powell, Williams, Warner, and Parker. Of these cases, three were reversed for Batson violations.

We note that many of the traits exhibited by the black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the state. The fact that two

blacks actually sat on the jury is not proof that no racial discrimination occurred. United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990); Mitchell v. State, [Ms. 89-860, February 1, 1991]____ So.2d____ (Ala. Cr. App. 1991). "'[T]he removal of even one juror for a discriminatory reason is a violation of the equal protection rights of both the excluded juror and the minority defendant.'" Parker, 568 So.2d at 338 quoting, Harrell v. State, 555 So.2d 263, 267 (Ala. 1989). We find sufficient evidence from the record to indicate "disparate treatment" by the prosecutor between black members of the venire and its white members. Mitchell,____ So.2d at___; Branch. 526 So.2d at 624.

As stated above, this court may reverse the trial court's determination that the state's peremptory challenges were not motivated by intentional racial discrimination only if the trial court's determination was "clearly erroneous".

Mitchell, ___So.2d at___; Branch, 526 So.2d at 625. The United States Supreme Court recently stated in Powers v. Ohio, ___ U.S.__ , 111 S.Ct 1364, 112 L.Ed.2d 411 (1991), that:

> "A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."

Powers, ___U. S.___, 111 S.Ct. at___.

We find therefore, that the prosecutor's challenges of the above veniremembers was so racially discriminatory and that it so tainted the proceedings that the appellant's right to equal protection was denied and he did not receive a fair trial. Accordingly, the trial court erred in denying appellant's Batson motion.

For the reasons as stated above in parts I & II, this case is reversed and remanded to the Circuit Court for Montgomery County for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 89-342
(Montgomery Circuit Court No. 89-2098-PH)

Brad Haywood Sims vs. State of Alabama
Appellant Appellee

Dear Sir or Madam:

You are hereby notifed that on July 26, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Applications for rehearing overruled. Rule 39(k) motions denied. No opinion.

LANE W. MANN
CLERK
COURT OF CRIMINAL
APPEALS

lwm:wl

H. Joseph G.L. Marston, III
Assistant Attorney General
11 S. Union St.
Montgomery, AL 36130

Hon. Thomas M. Goggans
P. O. Box 1307
Montgomery, AL 36101

APPENDIX C

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

October 4, 1991

1901699

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Brad Haywood Sims v. State)

(CCA 89-342 (Montgomery CC-89-2098)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J. - Hornsby, CJ., Maddox, Adams, Houston, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said court. Witness my hand this 4th day of Oct 1991

/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

RELEVANT ALABAMA STATUTES

Code of Alabama , 1975:

Title 12, § 12-16-100. DRAWING, SELECTION AND EMPANELING OF JURIES IN CRIMINAL CASES - GENERALLY.

(a) In every criminal case the jury shall be drawn, selected and empaneled as follows: Upon the trial by jury in the circuit courts of any person charged with a felony, including a capital felony, a misdemeanor, or violation, the court shall require a strike list or lists to be complied from the names appearing on the master strike list as established in section 12-16-74. In compiling the list or lists, names of qualified jurors may be omitted on a nonselective basis. A strike list shall be furnished for the trial of any case at hand and a copy thereof given to all parties. the jurors whose names appear thereon shall be brought into open court, the

case shall be called and in the presence of the district attorney and the defendant and his attorney, the jurors shall be examined on voir dire for the trial of the case at hand. After the conclusion of the voir dire examination and the removal from the strike list of the names of those jurors who were challenged or excused for good reason, the district attorney shall be required first to strike from the strike list the name of one juror, and the defendant shall strike one, and they shall continue to strike off names alternately until only 12 jurors remain on the strike list and these 12 jurors thus selected shall be the jury charged with the trial of the case. If any defendant shall refuse to exercise a strike to which he is entitled, then the judge presiding shall exercise that defendant's strike for him. The number of names appearing on the strike list upon

commencement of striking, unless a lesser number is agreed to by the parties, shall not be less than 36 if the offense charged is a capital felony nor less than 18 if the offense charged is a misdemeanor or violation. In the event the list of competent prospective jurors is reduced to fewer than the number required by this subsection, the court shall add prospective jurors in the manner prescribed in section 12-16-76. No special venire shall be ordered, drawn, or summoned for the trial of any person indicted for a capital felony.

(b) The court may in its discretion qualify such alternate jurors as it deems necessary, except that in capital cases the court shall qualify at least two alternate jurors, as required by law. Alternate jurors shall be drawn from the venire in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same

functions, powers, facilities, and privileges as the principal jurors, except that they shall not deliberate with the jury or vote upon the verdict unless designated to replace a principal juror. An alternate juror who does not replace a principal juror shall be discharged at the time the jury retires to consider its verdict.

(c) If the court determines that more than two alternate jurors shall be selected in a capital case, or that one or more alternate jurors shall be selected in a noncapital case, upon commencement of striking, unless the parties consent to the use of a lesser number, the minimum number of names required on the strike list in subsection (a) shall be increased by two for each alternate juror to be selected; provided that such increase in names shall not apply for the first two alternate jurors to be selected in a capital case. The parties shall then strike from the strike list as herein provided until there remain

12 jurors. The last juror or jurors struck shall be the alternate or alternates, and if it becomes necessary for an alternate to replace a principal juror, the last juror struck shall be designated. The identity of alternate jurors shall not be divulged to the jurors until the jury retires for deliberation.

(d) Any county having existing laws on April 15, 1982 establishing procedures for the selection and use of alternate jurors, may at the election of the presiding circuit judge, continue to follow the provisions of such law with respect to the selection of alternate jurors. Such election must be made in writing within 30 days of April 15, 1982 and filed with the secretary of state, the clerk of the supreme court, the administrative office of courts and the local bar of the county affected thereby. At any time after said election, either the presiding circuit judge, or a majority of the circuit judges in the

circuit wherein the county is located, may elect to come under the provisions of this chapter by filing written notice as required above.

Title 13A, §13A-12-211 UNLAWFUL DISTRIBUTION OF CONTROLLED SUBSTANCES.

(a) A person commits the crime of unlawful distribution of controlled substances if, except as otherwise authorized, he sells, furnishes, gives away, manufactures, delivers or distributes a controlled substance enumerated in schedules I through V.

(b) Unlawful distribution of controlled substances is a Class B felony.

§13A-12-215. SCHEDULES OF CONTROLLED SUBSTANCES.

"The schedules I through V referred to in this article are the schedules contained in Sections 20-2-20 through 20-2-31, or in those schedules as revised and republished annually by the state board of health pursuant to section 20-2-32.

Title 20, §20-2-23. SAME -- LISTING OF CONTROLLED SUBSTANCES.

The controlled substances listed in this section are included in schedule I:

(1) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by combination of extraction and chemical synthesis:....

d. Coca leaves and any salt, compound, derivative or preparation of coca leaves and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecogonine.

APPENDIX E

FACTS PROVEN AT TRIAL

On the trial, the facts relating to the controlled buy, the search and the marked money as set out in Section I of the Statement of The Facts in the petition, were proven by the testimony of Officers Robert Lay and William Jamison. (R. Vol. 5, pp. 246-339 and Vol. 6, pp. 624-645)

Julius Moore testified to the details of the drug sale and the Respondent's statement about having several ounces of cocaine the next day. (R. Vol. 7, pp. 693-705 and 707-709)

After the search of his house, the Respondent was taken to police headquarters. It is not clear if this was an arrest or not, since the Respondent was a Montgomery Police officer. At police headquarters, while he waited to be interviewed, the Respondent volunteered to Officer Tom Sims that he, the Respondent, knew his day was coming, that he, the

Respondent, knew that he was suspected of dealing drugs and was under surveillance, that he had responded to this presumed state of affairs by telling people that he was a "big drug dealer" and endeavoring to antagonize the people whom he thought were watching him. (R. Vol. 8, pp. 812-824)

Officers Michael Jones and J. M. Wooten drove the Respondent to the station. To them, he volunteered that marked money had been found in his house and a suggestion that it may have been money paid to him on a loan. (R. Vol. 8, pp. 881-887)

The State also proved admissions by the Respondent that he was deeply in debt and had serious overdraft problems. The Respondent gave contradictory and patently false explanations for the marked money found in his closet. (R. Vol. 8, pp. 893-908)

The Respondent claimed that the money found in his closet came from various legitimate sources, including money paid to

him on an alleged loan by Eric Johnson on September 29, 1989. (R. Vol. 10, pp. 1293 - Vol. 11, p. 1631)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of December, 1991, I did serve the requisite number of copies of the foregoing on the Attorney* for Brad Haywood Sims, Respondent, and his former attorneys** by mailing the same to said Attorneys first class postage prepaid and addressed as follows:

Honorable Thomas M. Goggans*
Attorney at Law
Post Office Box 1307
Montgomery, Alabama 36101

Honorable Julian L. McPhillips** and
Honorable Kenneth J. Shinbaum**
Attorneys at Law
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ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

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